STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYNOR DAVID FOX,

Defendant-Appellant.

UNPUBLISHED
December 28, 2006

No. 261972
Lapeer Circuit Court
LC No. 04-008165-FC

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant was convicted of first-degree murder, MCL 750.316, intentionally discharging a firearm at a dwelling, MCL 750.234b, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison for his first-degree murder conviction, one and a half to four years in prison for his intentionally discharging a firearm at a dwelling conviction, and two years in prison for his felony-firearm conviction. He appeals as of right and we affirm.

Defendant first argues that the trial court erred when it denied his motion to present evidence of the victim's character. We disagree. Generally we review the trial court's evidentiary decisions for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, when a trial court's decision to admit evidence involves a preliminary question of law, such as whether a rule of evidence precludes the admission of evidence, we review the trial court's decision under a de novo standard of review. *Id*. Thus, when preliminary questions of law are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *Id*.

The relevance of a victim's aggressive character depends on whether it is used as proof of an essential element of a charge, claim, or defense, or whether it falls within an exception to MRE 404(a)'s propensity rule. *People v Harris*, 458 Mich 310, 317; 583 NW2d 680 (1998). MRE 404(a)(2) creates an exception for the admission of circumstantial character evidence of the victim only "[w]hen self-defense is an issue in a charge of homicide[.]" Here, defendant did not present a theory of self-defense, but rather presented alternative theories of accident or suicide. In fact, when defense counsel made his motion to present evidence of the victim's character, he specifically stated "we never proffered the defense of self-defense and that was not by oversight or mistake." Therefore, the MRE 404(a)(2) exception does not apply, and nor do any other exceptions to the general rule excluding propensity evidence. Moreover, the relevance

of the victim's propensity for aggression to a defense of accident or theory of suicide is tenuous at best and cannot be considered an essential element of a defense. Thus, we conclude that the trial court did not abuse its discretion when it denied defendant's motion to present evidence of the victim's character. MRE 404(a)(2); *Harris, supra* at 317.

Defendant next argues that the trial court committed clear error when it found that defendant's statements to the police were voluntary. We disagree. When reviewing a trial court's determination of the admissibility of a confession, we consider questions of law de novo, but will not reverse the trial court's factual findings unless they were clearly erroneous. *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000). A finding is clearly erroneous if it leaves the appellate court with a definite and firm conviction that a mistake was made. *Id*.

In determining the voluntariness of a defendant's confession, a court should consider the age of the defendant; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the defendant before he gave the statement in question; the lack of any advice to the defendant of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the defendant was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the defendant was deprived of food, sleep, or medical attention; whether the defendant was physically abused; and whether the defendant was threatened with abuse. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). No single factor is conclusive, but rather, the admissibility of the confession depends upon the totality of the circumstances. *Id*. at 564-565.

Before trial, defendant made a motion to suppress the various statements that he made to the police. After hearing all of the evidence, the trial court denied defendant's motion, finding that under the totality of the circumstances defendant's statements were voluntary and uncoerced. The trial court's factual findings were not clearly erroneous, nor did it improperly apply the law. Though defendant was not read his *Miranda*[1] rights before he gave each of the statements at issue, the record reflects that he was informed of his *Miranda* rights at the crime scene before he gave any of his statements. Additionally, the record reflects that throughout the relevant time period, defendant acknowledged that he understood his *Miranda* rights. Furthermore, defendant was re-advised of his *Miranda* rights before he gave his most incriminating statement to Officer Eric Bannan. It was also undisputed that defendant was approximately 51 years old at the time he gave his statements, had a high-school diploma, and had previously dealt with the police on over 20 occasions. Moreover, defendant was not ill, injured or intoxicated at the time that he gave his statements; in fact, the record establishes that defendant appeared to be sober and responsive when he gave each of his statements, and was given fluids, hot meals, aspirin for his headaches, and was allowed to take cigarette and bathroom breaks. The record also reflects that even though defendant was interviewed on numerous occasions, defendant's interviews were all short and to the point. Finally, the record reflects that defendant was never threatened or coerced during any of his interviews, which is best summed up by his own statement, "I don't feel coerced at all. I gave these statements free

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

and voluntarily." Thus, even though defendant's final statement was given two days after he was arrested on unrelated outstanding warrants, we conclude that the trial court did not commit clear error when it found that defendant's questioned statements were voluntary. *Akins, supra* at 564-565; *Manning, supra* at 631-632, 638-639.

We also disagree with defendant's argument that the trial court abused its discretion when it denied his motion for a mistrial, which was based on the fact that the prosecution's references to a polygraph test allegedly denied defendant his right to a fair and impartial trial. We review a trial court's ruling on a motion for a mistrial for an abuse of discretion. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000).

A mistrial should be granted only because of an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). The results of a polygraph examination are inadmissible in evidence because polygraphs are not generally accepted as reliable by the scientific community. *People v Rogers*, 140 Mich App 576, 579; 364 NW2d 748 (1985), citing *People v Barbara*, 400 Mich 352, 377; 25 NW2d 171 (1977). However, reference to a polygraph test does not always require reversal. *Nash, supra* at 98. When determining if a reference to a polygraph test should require reversal, a court should consider "whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted." *Id*., quoting *People v Rocha*, 110 Mich App 1, 9; 312 NW2d 657 (1981).

Here, after the prosecutor established that Bannan did not confront defendant with any of the inconsistencies in his story during the first part of the interview, the prosecutor stated, "So the next he's saying this doesn't make sense," to which Officer Ron Johnson replied, "[a]fter the polygraph – I'm sorry." The prosecutor ignored Johnson's unsolicited reference to the polygraph, and asked whether the interview became confrontational after Bannan confronted defendant about the inconsistencies in his story. After the prosecutor finished his direct-examination of Johnson, defense counsel made a motion for a mistrial, which was based on the alleged unreasonable prejudice caused by Johnson's reference to the polygraph test. The trial court denied defense counsel's motion, finding that the polygraph reference was not intentionally elicited, the prosecution ignored the reference and promptly moved forward, and Johnson never indicated what the results of the polygraph test were. The trial court offered to give a curative instruction regarding the reference, but defense counsel denied the offer.

Given the context of Johnson's reference to a polygraph test, we conclude that the reference was inadvertent and unsolicited, and accordingly, was also not solicited in an attempt to bolster a witness's credibility. Thus, we conclude that the trial court did not abuse its discretion when it denied defendant's motion for a mistrial. *Nash, supra* at 96, 98; See also *People v Kiczenski*, 118 Mich App 341, 345-347; 324 NW2d 614 (1982) (holding that the trial court did not err when it denied a defendant's motion for mistrial that was based on an inadvertent, unsolicited and unrepeated reference to a polygraph examination).

Defendant next argues that the prosecutor committed misconduct that denied defendant his right to a fair and impartial trial. We disagree. Defendant failed to properly preserve his prosecutorial misconduct arguments for appeal by objecting to the prosecutor's alleged instances

of misconduct on the same ground that he asserts on appeal. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). We review unpreserved claims of prosecutorial misconduct for a plain error affecting the defendant's substantial rights, and will reverse only if the plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the defendant's innocence. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). An attorney may not knowingly offer or attempt to elicit inadmissible evidence, but may argue reasonable inferences from the evidence. *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986). A prosecutor may not make a statement of fact unsupported by the evidence, but is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). A prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness, but he may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes. *Thomas, supra* at 455. Furthermore, a prosecutor may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). A prosecutor's remarks are reviewed in context to determine whether the defendant was denied a fair trial, including consideration of the remarks in light of defense arguments. *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003). Finally, nonresponsive answers to a prosecutor's questions by a prosecution witness are not attributable as misconduct to the prosecutor unless the prosecutor knew, encouraged, or conspired with the witness to provide the unresponsive testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990).

Here, the prosecutor questioned Phillip Turner, who had spent time in prison with defendant, regarding what defendant told him about the incident in question. After the prosecutor elicited information that defendant told Turner that he shot the victim, laid her down, burned his clothes, cleaned up and called the police to tell them that the victim killed herself, the prosecutor asked a broad follow-up question, "[w]hat happens from there," to which Turner responded, "[h]e told me about a case he had in Oakland County about cocaine." The prosecutor interrupted Turner's discussion about the "cocaine case" by stating, "[s]ticking with this case what did he tell you about this?" After eliciting more details from Turner regarding what defendant told him, the prosecutor inquired into why Turner came forward with the information that defendant told him and what the costs of coming forward entailed. During this inquiry, the prosecutor established that being "a snitch" was not looked upon favorably in prison and then asked, "[w]ould this consider you being a snitch," to which Turner responded, "Yes it will. There is one thing too. A conversation that we had – one of our conversations was he was a hit man for the Tribesmen." Shortly thereafter, the prosecutor interrupted Turner by stating, "[w]e can't get into that." Furthermore, the prosecution also elicited testimony from Turner that after defendant found out that Turner was cooperating with the prosecution, defendant "had a couple of his cronies try to jump" Turner.

In regard to Turner's testimony about defendant's "cocaine case," and being a hit man for the "Tribesmen," we conclude that the record establishes that Turner volunteered the

information, and his answers were, to that extent, nonresponsive. Furthermore, defendant has not established that the prosecutor knew, encouraged, or conspired with Turner to provide the questioned testimony. Thus, Turner's testimony about defendant's "cocaine case," and being a hit man for the "Tribesmen," are not attributable as misconduct to the prosecutor and did not deny defendant his right to a fair and impartial trial. *Hackney, supra* at 531.

We also reject defendant's argument that Turner's testimony that defendant "had a couple of his cronies try to jump" Turner, was improperly elicited by the prosecutor and denied defendant his right to a fair and impartial trial. Turner's testimony in this instance was properly elicited to rebut defense counsel's anticipated attack on Turner's credibility, which ended up being based on the fact that Turner was being rewarded for testifying by having misdemeanor charges dismissed and being transferred away from Jackson Prison. Rebuttal evidence is admissible to contradict, repel, explain, or disprove impeachment evidence produced by the other party if the rebuttal evidence is narrowly focused on refuting the other party's impeachment evidence. *People v Spanke*, 254 Mich App 642, 644-645; 658 NW2d 504 (2003). Accordingly, Turner's statement regarding being "jumped" did not deny defendant his right to a fair and impartial trial, let alone amount to plain error affecting substantial rights. *Ackerman, supra* at 452; *Spanke, supra* at 644-645; *Watson, supra* at 592-593.

We likewise reject defendant's argument that the prosecutor committed plain error when he commented on facts not in evidence during his closing argument. We agree with defendant that the prosecutor cannot comment on things that have not been admitted into evidence, such as newspaper articles. *Dyer, supra* at 576; *Schultz, supra* at 710. However, the prosecutor may argue all reasonable inferences from the evidence presented, *Dyer, supra* at 576; *Schultz, supra* at 710, and may do so in a way to support an argument that his witness is credible, *Howard, supra* at 548. Here, Turner testified to specific details about defendant's case, his credibility was challenged by defendant, and a reasonable person could make a common sense inference that the details that Turner testified to (i.e., that defendant and the victim were arguing about property, that defendant laid the victim down after he shot her, and that defendant immediately burned his clothes after he shot the victim) would not be included in a newspaper story about the incident. Thus, the prosecutor's comments were proper. *Dyer, supra* at 576; *Schultz, supra* at 710; *Howard, supra* at 548.

Furthermore, assuming arguendo that the prosecutor's actions were improper, Bannan testified that defendant told him that "his hand was on the gun when [the victim] was shot in the head," and that he must have "accidentally shot [the victim] in the head during [their] argument and it was more likely than not that the gun was in his hand and his finger was on the trigger." Thus, there was overwhelming evidence presented that established that defendant was guilty. Moreover, the trial judge instructed the jury that it was only to consider properly admitted evidence, and that the lawyers' statements and arguments are not evidence.[2] Thus, even if it were found that the prosecutor's comments were improper, it cannot be said that the comments

[2] A jury is presumed to follow a judge's instructions. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005).

denied defendant his right to a fair and impartial trial, let alone amounted to plain error affecting substantial rights. *Thomas, supra* at 455.

Defendant's final argument is that the trial court abused its discretion when it refused to instruct the jury on manslaughter and reckless discharge of a firearm. We disagree. We review a trial court's determination whether a jury instruction was applicable to the facts of the case for an abuse of discretion. *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005), rev'd on other grounds 474 Mich 1108 (2006). However, the issue of whether an offense is a lesser-included offense is a question of law, which we review de novo. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003). Finally, a jury's conviction of a defendant for first-degree murder when also instructed on the lesser included offense of second-degree murder reflects an unwillingness to convict on another lesser included offense like manslaughter, and thus, the failure to instruct on further lesser included offenses, like manslaughter, is harmless. *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997).

Here, the jury convicted defendant of first-degree murder, despite also being instructed on second-degree murder. Thus, even if we assume instructional error occurred, it would have been harmless error and would not merit reversal. *Raper*, *supra* at 483.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Pat M. Donofrio